IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 808.

DISTRICT OF COLUMBIA, PETITIONER,

vs.

R. P. ANDREWS PAPER COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the District of Columbia by its Commissioners, Louis Brownlow and Charles W. Kutz, and shows to the court as follows:

1. That the act of Congress of September 1, 1916 (39 Statutes, 716), provided (sec. 7), "That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users" (Record, Ct. of App. D. C., No. 3267, p. 80).

2. That the respondent herein, the R. P. Andrews Paper Company, is a corporation, engaged in business at Numbers 727 to 731 Thirteenth street northwest, Washington, D. C., and uses a vault built under the sidewalk in front of said premises in connection with the business of the respondent, conducted on the premises.

3. That the said vault was constructed by one James Sharp under a permit issued by the District of Columbia on the 30th day of July, 1912, as follows:

> "This permit is accepted on condition that the District of Columbia has the right at any time to construct under, over or through said vault space, water pipes, gas pipes, sewers, conduits or other pipes or underground construction that the Commissioners of said District may deem necessary to be placed in the space occupied by the vault, without compensation.
>
> "And it is further agreed that in accepting this permit that the owner or owners, their heirs, executors, administrators or assigns, immediately upon notice from the Commissioners of the District of Columbia that the water pipes, gas pipes, sewers, conduits or other pipes, or underground construction, are to be introduced in the space occupied by the vault, shall commence to move, and forthwith remove, if necessary, any boiler, pipe, wall, beam, machinery or construction in or pertaining to said vault, or any fixture or other thing therein, without cost to said District, so as to leave a space near and sufficient in the judgment of said Commissioners for the introduction and maintenance of any underground construction from time to time deemed necessary by said Commissioners. And said Commissioners reserve the right to enter upon the premises at any time for the inspection and proper maintenance or repair of any work constructed by the District. In case the street, roadway or sidewalk is widened, the vault shall be changed to correspond therewith, without expense to the District of Columbia, as directed by the Commissioners of said District. And this permit is accepted with the understanding that the occupation of the vault space is

> permitted merely as an accommodation to the owner of the abutting premises and that no right, title, or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid." (Record, App. D. C., No 3267, pages 15, 16.)

This permit was issued at a time when under the building regulations there was no charge for such occupation of public space. The regualtions provided as follows (Record, C. of App. D. C., No. 3267, p. 7, par. 9):

> "No charge will be made for the occupancy of public space by vaults or areas, except the usual permit fee, and all permits for such occupancy are subject to revocation by the Commissioners at any time without compensation, when the vault space is needed for public use or improvements.
>
> "No vaults shall be constructed so as to interfere with any sewer, water pipe, manhole, gas pipe, tree, or other public work or improvement, nor with any electric conduit carrying fire-alarm or police wires."

The usual permit fee of $1.00 was charged the owner under the building regulations at the time this permit was issued (Record, C. of App., D. C., No. 3267, p. 8). There was no other compensation.

4. That pursuant to the said act of 1916, the Commissioners of the District of Columbia promulgated certain rules and regulations and established the rates to be paid for such vaults (Record, C. of App., No. 3267, pages 8, 9). It was agreed by the parties to this cause that the rentals charged for the use of such vaults were reasonable, if a legal charge (Record, C. of App., D. C., No. 3267, p. 9).

5. That the tenant then in possession of premises, the user of the vault, refused to pay such rental, and thereupon the District of Columbia brought an action of assumpsit in the Supreme Court of the District of Columbia and was given judgment against the R. P. Andrews Paper Company for

two years' rental—the sum of $124.36, with interest from the 30th day of November, 1916 (Record, App. D. C., No. 3267, p. 17). The case was tried upon an agreed statement of facts. The defendant appealed to the Court of Appeals of the District of Columbia, which reversed the judgment of the lower court, Chief Justice Smythe, dissenting.

6. It is a matter of common knowledge that the business section of Washington has been long established and that practically every business house in the city uses a vault under the sidewalk as an adjunct to its business. It follows under the decision of the Court of Appeals, which held the law to be prospective only in its operation, that none of these phases will ever pay anything as rental therefor. The incongruous situation will therefore arise of one merchant occupying vault space rent free, and his neighbor paying for that privilege. The decision also means the loss of considerable revenue to the District of Columbia. The most important phase of the matter, however, is the power of the Commissioners of the District to surrender, *in perpetuum*, without consideration and without express authority of Congress, the right to occupy the public highways of the city.

7. Your petitioner, therefore, prays that the writ of certiorari may issue out of this honorable court, directed to the said Court of Appeals, commanding said court to certify and send to this court at a time certain to be therein designated a full and complete transcript of all of the proceedings in said Court of Appeals in said case entitled therein No. 3267, R. P. Andrews Paper Company *vs.* the District of Columbia, to the end that said case may be reviewed and determined by this court, and that the said decision of the said Court of Appeals in said case, and every part thereof, may be reversed by this honorable court.

LOUIS BROWNLOW,
C. W. KUTZ,
Commissioners of the District of Columbia.

F. H. STEPHENS,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

We, Louis Brownlow and Charles W. Kutz, Commissioners of the District of Columbia, do solemnly swear that we have read the foregoing and annexed petition by us subscribed, and know the contents thereof, and that the matters and things therein stated upon our personal knowledge are true, and those stated upon information and belief we believe to be true.

LOUIS BROWNLOW,
C. W. KUTZ,
Commissioners of the District of Columbia.

Subscribed and sworn to before me this 16th day of March, 1920.

WILLIAM TINDALL,
Notary Public, D. C.

BRIEF IN SUPPORT OF PETITION.

The majority opinion of the Court of Appeals proceeded upon the theory the District of Columbia had entered into the contract with the builder, James Sharp, for construction of the vault in question and the builder had thereby acquired the vested right which could not be disturbed either by the District or by Congress. The terms of the permit itself asserted "this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title, or interest of the public is in any way waived or abridged thereby, except as expressed in a certain permit and the conditions offered." This language negatives the idea of a contract and puts the builder in the position of a mere licensee; and such was the decision of the court in Tacoma Safety Deposit Company against Chicago, 247

Ill., 192 (31 L. R. A., 868, 869). In that case the question arose as to the power of the city to require the adjoining owners to pay compensation for the use of space beneath the sidewalk. The building was on the corner of two streets, where the fee in one of the streets was still in the owner of the abutting property and the fee of the other street was in the city. The court held that no compensation could be required for the occupation of vaults beneath the streets while the fee was in the owner, but could be required for vaults beneath the street while the fee was in the city. That a permit to build "did not estop the city afterwards from requiring the complainant to pay for the use of the city's property which its building in part occupied or to remove its building or the part thereof which rested upon the city's property. The complainant at most, we think, obtained a license to construct a subway beneath the sidewalk of the city adjoining its street, which license could be revoked by the city in case the complainant refused to comply with the ordinance which required it to pay to the city compensation for the use of the space beneath the sidewalk in the street which belonged to the city" (31 L. R. A., N. S., 873). This was one of the cases relied upon in the opinion of the majority of the Court of Appeals. The fee in the street in the present case is in the United States. It will be observed also that the supposed contract is without any consideration to the city. The regulation stated that no charge would be made "except the usual permit fee." It is obvious that this is not a consideration. If by any possibility it could be so viewed, it would be entirely inadequate.

Whether there was a contract between the city and the builder or not, certainly the builder acquired no vested rights in the highway. In 3 Dillon on Municipal Corporations, 5th edition, par. 1180, the author says that the presumption of assent on the part of the city to the erection of a vault is not a presumption of a grant of title or of a permanent right of the city, "as no power exists in the authorities to make such grant or to confer any such right" (citing De-

shong against New York, 176 N. Y., 475, 483), and the author further adds that "there is no absolute right in the owner to occupy the streets whether the fee is in the city or in the owner.

Had the Commissioners attempted by formal contract to grant the owner of the premises, for an adequate consideration, a perpetual easement in the streets of the city, they would have been without power to do so. The only authority the Commissioners have for making building regulations is found in the acts of June 14, 1878, 20 U. S. Stat., 131, as follows:

> "That the Commissioners of the District of Columbia be, and they hereby are, authorized and directed to make and enforce such rules and regulations relative to the sale of coal in the District of Columbia as shall insure full weight to purchasers of coal; also, such building regulations for the said District as they may deem advisable."

Neither this nor any other authority, general or special, confers upon the Commissioners any power to grant easement in the streets. On the contrary, the Revised Statutes of the District of Columbia, sec. 222, provides, "No open space, public reservation, or other public ground in the city of Washington or other portion of public streets or alleys in said city shall be occupied by any private person for any private purpose whatever." This has been the general policy of Congress and of the District, but has been relaxed in some particulars so as to permit the occupation of a portion of the sidewalk adjoining business property for the display of merchandise not necessary to be recounted here.

This court has repeatedly declared that it is not within the power of a municipality to convey *in perpetuum* franchises in public highways unless that power "be granted in express words."

A few illustrative excerpts from the opinion of this court will suffice.

This court in the case of District of Columbia *vs.* Bailey, 171 U. S., 161, after a very careful examination and review of the statutes, decided that the Commissioners of the District of Columbia had no power to submit a claim to a common-law arbitration, as this involved the power to make a contract with the obligation to pay money. The court said (page 174), referring to the act of June 11, 1878, which provided a permanent form of government for the District of Columbia (20 Stats., 103):

> "It was expressly enacted, however, in the same section (sec. 3) that the Commissioners, in the exercise of the duties and authority vested in them, 'shall make no contract nor incur any obligation other than such contracts and obligations as are hereinafter provided and shall be approved by Congress.'"

and on page 176:

> "The necessary operation of this provision of the statute is to cause the District Commissioners to be merely administrative officers with ministerial powers only. The sum of the municipal powers of the District of Columbia are neither vested in, nor exercised by, the District Commissioners. They are, on the contrary, vested in the Congress of the United States, which acts *pro hac vice* as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials."

And such, it might be added, has been the consistent ruling of the Court of Appeals: Walter *vs.* MacFarland, 27 App., D. C., 182; power to narrow roadways: Coughlin *vs.* D. C., 25 App., 251; power to pass regulations for the removal of snow and ice from the sidewalks: Daly *vs.* MacFarland, 28 App., 552; revocation of plumber's license: Fay *vs.* MacFarland, 32 App., 295; alley condemnations: Berry *vs.* D. C., 32 App., 96; making exceptions to the building regulations: B. & O. *vs.* FitzGerald, fencing in of railroad tracks. In the last-named case (page 142) the court also said that "the priv-

ilege of a railroad company to lay its tracks along a city street is a mere license, revocable at the will of Congress."

The cases relied upon by the Court of Appeals were Tacoma Safety Deposit Company *vs.* Chicago, 247 Ill., 192; 31 L. R. A., 868, already referred to; Gregoten *vs.* Chicago, 145 Ill., 451; 36 Am. St., 496, which held in brief that a city might make, for a consideration, an irrevocable contract for the occupation of vaults, and that such permit cannot be revoked at will for the benefit of some other person who is said to be invested with a similar permit. Minor privilege cases, 131 Md., 600, in which the mayor was enjoined from revoking all minor privileges, such as vaults, porches, areas, etc., for the purpose of increasing the rental; and Babbage *vs.* Power, 130 N. Y., 281; 14 L. R. A., 398; 29 N. E., 132, which was a case for personal injuries, brought against the owner of the property because of the breaking of a flagstone in the sidewalk.

The court held that the possession of the vault for a long period of years with the acquiescence and knowledge of public officials raised the presumption of a permit.

In Citizens Railway *vs.* Detroit Railway, 171 U. S., 48, 53, 54, 55, the question was whether the city had granted an exclusive franchise in the streets. The court said:

> "The argument is strong, and all of its strength has been presented and is appreciated, but there exists considerations of countervailing and superior strenth. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for

it are expressed in Minturn *vs.* Larue, 23 How., 435; Wright *vs.* Nagle, 101 U. S., 791; State *vs.* Cincinnati Gas Light and Coke Co., 18 Ohio St., 262; Parkhurst *vs.* Salem, 32 Pac. Rep., 304; Saginaw Gas Light Co. *vs.* Saginaw, 28 Fed. Rep., 529, decided by Mr. Justice Brown of this court; Long *vs.* Duluth, 51 N. W. Rep., 913. See also Grand Rapids Electric Light and Power Co. *vs.* Grand Rapids, &c., Co., 33 Fed. Rep., 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also Oregon Railway & Navigation Co. *vs.* Oregonian Railway Co., 130 U. S., 1; Central Transportation Co. *vs.* Pullman Palace Car. Co., 139 U. S., 24.

"The power, therefore, must be granted in express words or necessarily to be implied."

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"Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

In Skaneateles Water Co. *vs.* Skaneateles, 184 U. S., 354, 363, the court said:

"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We thing none such arises from the facts detailed."

In Knoxville Water Co. *vs.* Knoxville, 189 U. S., 434, 436, 438, the question was in the power of the city to reduce water rates. The court said:

> "The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See Georgia Railroad & Banking Co. *vs.* Smith, 128 U. S., 174; Ragan *vs.* Aiken, 9 Lea, 609. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply."
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> "Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it, subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts. New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79, 91, 92; Browne *vs.* Turner, 176 Massachusetts, 9, 15."

In City of Joplin *vs.* Southwest Missouri Light Co., 191 U. S., 150, the city had granted a franchise, under ordinance, to operate waterworks for twenty years. By a subsequent ordinance the city provided for an issue of bonds to build its own plant. The company brought injunction to restrain the city, on the ground that the obligation of the contract, its grant of franchise, had been impaired. The court said:

> "It is by implication from the statute and the ordinance passed under it, not from the explicit expres-

> sion of either, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, and yet it is conceded that the grant to the appellee is not exclusive. * * * The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

To the same effect are Bienville Water Supply Co. *vs.* Mobile, 175 U. S., 109; 186 U. S., 212; Walla Walla City *vs.* Walla Walla Water Co., 172 U. S., 1; Gas Co. *vs.* Hamilton, 146 U. S., 258, 261, 268; Water Co. *vs.* Knoxville, 200 U. S., 22, 33, contracts construed in favor of public.

The point must not be lost sight of that the power exercised in the present case of imposing rentals for the use of vaults under the public highways is the exercise of Congress and not an act of the municipal authorities. In the case of Sioux City Railway *vs.* Sioux City (138 U. S., 98; 106, 107), the railway company was required by ordinance to pay for paving between the tracks. The legislature required the company to pay for one foot outside of the tracks. It was assessed a special tax against this cost. The company claimed it was not compelled to pave any way except between the rails. The court held that "it was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company" (page 107).

F. H. STEPHENS,
Attorney for Petitioners.

[redacted]

No. [redacted]

DISTRICT OF COLUMBIA

vs.

R. P. KINGSLAND, PAUL CO., A Corporation

No. [redacted]

DISTRICT OF COLUMBIA

vs.

[redacted] & COMPANY, A Corporation.

No. [redacted]

DISTRICT OF COLUMBIA

vs.

ABRAHAM LISNER

[redacted]

F. H. STEPHENS,
Corporation Counsel, D. C.,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 282.

DISTRICT OF COLUMBIA

vs.

R. P. ANDREWS PAPER CO., A CORPORATION.

No. 283.

DISTRICT OF COLUMBIA

vs.

SAKS & COMPANY, A CORPORATION.

No. 284.

DISTRICT OF COLUMBIA

vs.

ABRAHAM LISNER.

BRIEF ON BEHALF OF PETITIONER.

Statement.

The respondents are merchants doing business in the District of Columbia and use in connection with their business vaults constructed under the public highway adjacent to

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their premises. Under the act of September 1, 1916 (39 Stats., 716), Congress provided:

> "SEC. 7. That hereafter the Commissioners of the District of Columbia are authorized and directed to assess and collect rent from all users of space occupied under the sidewalks and streets in the District of Columbia, which said space is occupied or used in connection with the business of said users."

Under the authority thus conferred the Commissioners fixed a rental for the use of such space, which is conceded to be a reasonable rental, but which the several respondents refused to pay, and suit was accordingly brought by the District against them. The cases were tried upon an agreed statement of facts and resulted in each case in a judgment in favor of the District for the amount of rental claimed.

The vault used by the Andrews Paper Company was constructed under a permit obtained July 30, 1912 (R., No. 282, p. 10), and issued to the owner, James Sharp. The respondent is a tenant of Sharp's and the user of the vault.

Saks & Company are long-term tenants of the premises, and constructed the vaults used by them under the public highway under a permit dated September 25, 1884 (R., No. 283, p. 11).

Abraham Lisner is the owner of the premises adjacent to the vault under the public highway used by him, and constructed the vault under a permit dated January 9, 1914 (R., No. 284, p. 10).

It will be noticed by reference to the agreed statement of facts (R., No. 282, p. 3 *et seq.*) that the policy of the municipal authorities in regard to charging rental or fees for vault space varied from time to time. From 1791 down to 1864

there appears to have been no charge for vaults other than a nominal permit fee, if there were that. In 1864 the policy was changed and a charge of 50 cents a square foot was made (R., p. 4). When the regulations were revised in 1872 there was no charge for vaults. In 1877 the policy was again changed and the charge of $2.00 per linear foot was prescribed. This continued to be the policy of the Commissioners, and the same charge was made until 1887, when the fee was changed to 3 cents per cubic foot (R., p. 5). This charge continued until the revision of 1891, when the charge became 15 cents per cubic foot. This continued to be the charge for a year, and in 1892 it was modified to 15 cents per cubic foot in front of business houses and 10 cents per cubic foot in front of dwellings. This continued to be the charge until 1897, when the charge was abolished and no fee charged except "the usual permit fee."

The legislation of 1916, under review here, was the first time that an annual rent was imposed for vaults.

It thus appears that at the time the Andrews vault was constructed, 1912, and when the Lisner vault was constructed, 1914, there was no rental charge for vaults other than the usual permit fee. When the Saks vault was constructed in 1884, the charge prescribed was that under the regulations of 1877, $2.00 per linear foot. The frontage of the Saks property (R., 283, p. 11) was given as 43′ 6″. The charge thus would have been $87. The annual rental charge under the act of 1916 for this vault is $89.25 (R., 283, p. 2-3), for the first year and $98.63 for the second year. The value of the vault space is given by the assessor at $23,655 for the second year. The value of the Andrews vault is $15,370 and the annual rent at $64.04 (R., No. 282, p. 3). The value

of the Lisner vault is $120,672, and the annual rent $603,36 (R., No. 284, p. 3).

The permit in each case contains this stipulation, "and this permit is accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises and that no right, title, or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid" (R., 282, pp. 6, 7; R., 283, pp. 6, 7). There was also a provision in the building regulations, made a condition of the permit, that—

> "Par. 3. The application for a vault must be accompanied by a written agreement, upon an official blank, signed by the owner of the abutting property and in terms of section 124, contracting to release and relinquish the vault space, and to remove, free of expense to the District, all machinery, fixtures, or structural parts of the vault when so ordered by the Commissioners, or needed for public uses." * * *
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> (See p. 7 of the record in each case.)

Assignment of Errors.

The petitioner assigns for error in these cases:

1. The ruling of the court below that there was a contract between the District of Columbia and the respective respondents which could not be impaired by an act of Congress. There was no contract, but a mere license to occupy public space subject to revocation by the Commissioners.

2. The ruling of the court below that the act under review applied only to vaults erected after the passage of the act.

3. The holding of the court below, in substance, that the respondents had been granted a perpetual license in public highways which could not be affected by the act in question.

ARGUMENT.

The argument in the court below, on behalf of the respondents, proceeded almost entirely upon the theory that the licensees had acquired a vested right to the use of such vaults, free of any charge for rent, for the reason that no rental or charge for the use of them was required at the time they were built, and that the issuance of a permit to build the vaults constituted a contract, the obligation of which could not be impaired even by act of Congress. This argument would not apply to Saks because, at the time his vaults were built, 1884, a fee of two dollars per linear front foot was charged under the regulations then in force. In view of the fact that the municipal authorities were very careful to surround the permits with conditions intended to prevent the very results which are claimed to flow from them, it would be surprising if the courts could or should find that the authorities had granted a perpetual easement to public space without any compensation therefor. When in each case the permits carried the conditions that they were "accepted with the understanding that the occupation of the vault space is permitted merely as an accommodation to the owner of the abutting premises, and that no right, title or interest of the public is in any way waived or abridged thereby, except as expressed in said permit and the conditions aforesaid"; and again, when, under paragraph 3, the licensees agreed to vacate the vaults "when so ordered by the Commissioners, or

needed for public uses," it was thought, and rightly so, and so held by the court below, that the interests of the public had been safely guarded. (R., No. 283, pp. 6, 7.)

If Andrews and Lisner have a vested right to the free use of public space and Saks has not, then we have the anomalous situation of a number of persons occupying public space for private purposes, for which some of them pay a reasonable charge and the others no charge. This, it is thought, might be a real discrimination, and not a fancied one, which has been argued by counsel for the respondents.

It has not been considered necessary on behalf of the District to follow the argument of the respondents in their discussion of vested rights or the impairment of the obligation of contracts. The cases cited are plainly not applicable to the present situation. Respondents assume that there has been a contract between them and the District; that the obligation of the contract has been impaired by the legislation in question; and that they have, therefore, been deprived of vested rights arising under the contract. The cases cited by them deal with pure contracts and with vested rights arising from them. The question here is whether there is a vested right at all, or any contract, the obligation of which has been impaired. They have assumed a vested right and built their argument upon this assumed right. As a matter of fact and law, no such right exists; neither a vested right nor a contract. Actually, they are mere licensees, accepting licenses on condition that they will quit when the Commissioners so order, under distinct notice, made a part of the permits, that "no right, title or interest of the public is in any way waived or abridged," and that their occupation of the public space is "merely as an accommodation" to the licensee. Notice, also,

that the license is granted without compensation, a consideration which figures largely in the case cited by respondents. How, under these circumstances, can it be argued with any force that they have a vested right to the public space occupied?

The Power of Municipal Authorities to Grant Perpetual Easements or Franchises in the Public Highways.

From a negative point of view it would seem that the municipality, the District of Columbia, is without authority to make the grant claimed by the respondents.

1. There is no grant of power to the municipality from which such a power could be directly or indirectly traced. This Court has repeatedly held the Commissioners are merely administrative officers and have no power to make contracts in the absence of legislation conferring such power. (D. C. *vs.* Bailey, 171 U. S., 161, 176, denying the power to the District to enter into a common-law arbitration, because of the lack of power to make contracts not "previously sanctioned by Congress or which they are authorized to make by express statutory authority.")

In a recent case the Court of Appeals held that the District had not the power to impose a fee for the inspection of elevators and hotels. Newman *vs.* Willard's Hotel Company, 47 App. D. C., 323.

2. In another case the Court of Appeals decided that the Commissioners had no power to pass ordinances upon a subject upon which Congress had legislated, although the legis-

lation had been declared by that Court to be invalid. Coughlin *vs.* D. C., 25 App., 251.

In view of the many instances in which Congress has granted franchises in the streets for street railroad and market purposes, it would seem that this particular power had been withdrawn, under the application of the decision in the above case, from the control or power of the Commissioners, conceding it to have once existed.

3. But passing this point, it is apparent that the District authorities have never, since the passage of the organic act of 1878, attempted to grant any franchise or any easement or license of a perpetual nature in the highways of the District. The absence of any attempt to exercise any such power and the absence of any grant of authority to the District, either direct or indirect, would seem to afford a fair basis for the assumption that it did not exist; and the presumption as to the power is against its existence, in the absence of clear and direct grant. D. C. *vs.* Bailey, 171 U. S., 161, 176.

4. The law involved in the present case is an act of Congress, not a municipal regulation. The licenses to the respondents arose under an ordinance. The power to make the ordinance had its source in Congress, which also had equal authority to revoke the power. This Congress did when it enacted the law which exacted a rental for the use of public space. The claim is, however, that the ordinance is superior to the act, a contention which was disposed of in Myers *vs.* D. C., 25 App. D. C., 132, 136.

Moreover, the fact that the fee of the streets is in the

United States, and not in the District, should not be lost sight of. If the fee of the streets were in the District, still the latter, in view of the exclusive power of legislation over the District vested in Congress, would not have the power to grant a franchise or perpetual easement or license in those streets, contrary to or in opposition to the will of Congress expressed in direct legislation, as in the law under discussion exacting the vault rental. Except, of course, in the instance that Congress had directed that very thing, in express terms, to be done. Where, however, the fee is not in the municipality, but in the sovereignty which created that municipality, the difficulties which confront the appellants in establishing as grant *in perpetuum* become insurmountable.

The claim of the respondents that they have a perpetual grant from the municipality, notwithstanding the expressed will of the sovereignty to the contrary, and in the absence of any grant, is not sustained by any principle or authority yet noted.

The Authorities.

Although the principles above enunciated would seem to be sufficiently clear without the need of illustration, decisions are not wanting upon the present issue.

Sioux City Railway *vs.* Sioux City, 138 U. S., 98, 106, 107: The city, by ordinance, required the company to pave between the tracks. The legislature required the company to pave one foot outside the tracks and assessed a special tax against it for this cost. The company claimed it was not compelled to pave anywhere except between the rails (p.

106). The Court held that "it was not in the power of the city by any contract with the company to deprive the legislature of the power of taxing the company" (p. 107).

Even if the charter were a contract, it might be amended by the legislature. Railway Company *vs.* Philadelphia, 101 U. S., 528, 537. In this case the charter of the company provided for a license fee of $30.00 for each car. The legislature increased this to $50.00, which increase was claimed to be a violation of the contract.

In Citizens Railway *vs.* Detroit Railway, 171 U. S., 48, 53, 54, 55, the question was whether the city had granted an exclusive franchise in the streets. The Court said:

> "The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges. The rule and the reason for it are expressed in Minturn *vs.* Larue, 23 How., 435; Wright *vs.* Nagle, 101 U. S., 791; State *vs.* Cincinnati Gas Light and Coke Co., 18 Ohio St., 262; Parkhurst *vs.* Salem, 32 Pac. Rep., 304; Saginaw Gas Light Co. *vs.* Saginaw, 28 Fed. Rep., 529, decided by Mr. Justice Brown of this court; Long *vs.* Duluth, 51 N. W. Rep., 913. See also Grand Rapids Electric Light and Power Co. *vs.* Grand

Rapids, &c., Co., 33 Fed. Rep., 659, opinion delivered by Mr. Justice Jackson at circuit. As bearing on the rule, see also Oregon Railway & Navigation Co. *vs.* Oregonian Railway Co., 130 U. S., 1; Central Transportation Co. *vs.* Pullman Palace Car Co., 139 U. S., 24.

"The power, therefore, must be granted in express words or necessarily to be implied."

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"Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

In Skaneateles Water Co. *vs.* Skaneateles, 184 U. S., 354, 363, the Court said:

"There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

In Knoxville Water Co. *vs.* Knoxville, 189 U. S., 434, 436, 438, the question was in the power of the city to reduce water rates. The Court said:

> "The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See Georgia Railroad & Banking Co. *vs.* Smith, 128 U. S., 174; Ragan *vs.* Aiken, 9 Lea, 609. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city 'by ordinance to regulate the price of water' which the company might supply."
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> "Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it, subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts. New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79, 91, 92; Browne *vs.* Turner, 176 Massachusetts, 9, 15."

In City of Joplin *vs.* Southwest Missouri Light Co., 191 U. S., 150, the city had granted a franchise, under ordinance, to operate water works for twenty years. By a subsequent

ordinance the city provided for an issue of bonds to build its own plant. The company brought injunction to restrain the city, on the ground that the obligation of the contract, its grant of franchise, had been impaired. The Court said:

> "It is by implication from the statute and the ordinance passed under it, not from the explicit expression of either, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, and yet it is conceded that the grant to the appellee is not exclusive. That is, it is conceded the city has not exhausted its power under the statute by the grant held by appellee, but may make another to some other person than the appellee. In other words, that the city may make a competitor to appellee, but cannot itself become such competitor. The strength of the argument urged to support the distinction is in the consideration that competition by the city would be more effective than competition by private persons or corporations—indeed, might be destructive. The city, it is further urged, could be indifferent to profits and could tax its competitor to compensate losses. But this is speculation and it may be opposed by speculation, and there are besides countervailing considerations. The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

To the same effect are Bienville Water Supply Co. *vs.* Mobile, 175 U. S., 109; 186 U. S., 212; Walla Walla City *vs.* Walla Walla Water Co., 172 U. S., 1; Gas Co. *vs.* Hamilton, 146 U. S., 258, 261, 268; Water Co. *vs.* Knoxville, 200 U. S., 22, 33, contracts construed in favor of the public.

While the Court of Appeals has not decided any case bearing an analogy as close as those cited above from this Court, yet the expressions of the Court would indicate the same trend.

In Penn Bridge Co. *vs.* U. S., 29 App. D. C., 452, 457:

> "The government of the District of Columbia is simply an agency of the United States for conducting the affairs of its government in the Federal District, and this work on the Piney Branch creek bridge was of a public, and not of a private, character."

In D. C. *vs.* Capital Traction Co., 41 App. D. C., 115, 119, relating to free transfers, the Court said:

> "The argument that the charter of defendant amounts to a contract, the obligation of which may not be impaired, may be briefly considered. (1) In the first place, the prohibition of laws impairing the obligations of contracts applies to the States, and not to the United States. The prohibitions to the United States are those of the 5th amendment, that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation. The application of these will be considered later.
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> "A contract between the United States and the defendant in error cannot be implied from the provision fixing a maximum rate merely. See Detroit United

R. Co. *vs.* Detroit, 229 U. S., 39, 44; 57 L. Ed., 1056, 1059; 33 Sup. Ct. Rep., 697, and cases there cited."

State Cases.

Tacoma Safety Dep. Co. *vs.* Chicago (247 Ill., 192), 31 L. R. A. (N. S.), 868: Suit to enjoin the enforcement of a municipal ordinance for vault rentals. The plaintiff had erected a large store fronting partly on La Salle Street, the fee of which was in the city, and partly on Madison Street, the fee of that part of which used for vaults was in the adjoining owner. The contention of the company was that the city, having given a permit to build the vaults, could not, by ordinance, afterwards exact a rental for their use; that the city was estopped; and also that the ordinance was discriminatory. The Court held that the city could exact a fee for the use of the vaults under La Salle Street when the fee was in the city; but not under Madison Street, where the fee was in the owner of the adjoining property; and that the owner could be required to vacate if the vault was needed for public purposes. The Court also held that the company had a mere license, and that there was no discrimination.

> "It is also urged that the city, having granted to the complainant a permit to construct its building upon its premises according to plans and specifications which provided for the construction of subways beneath the sidewalks adjoining its premises, is now estopped to deny the right of the complainant to maintain said subways upon the property of the city free of charge. It is too clear for argument, we think, that the city had the right to regulate the construction of complainant's building at the time it was erected; and the fact that it may, through

its building department, have approved certain building plans which were submitted to it by the complainant, and granted to it a permit to construct its building, we think obviously did not estop the city afterwards to require the complainant to pay for the use of the city's property which its building in part occupied, or to remove its building, or the part thereof which rested upon the city's property. The complainant, at most, we think, obtained a license to construct a subway beneath the sidewalk of the city adjoining its buildings, which license could be revoked by the city in case the complainant refused to comply with the ordinance which required it to pay to the city compensation for the use of the space beneath the sidewalk in the street which belonged to the city. We do not think the cases of Gridley *vs.* Bloomington, 68 Ill., 47; Gregsten *vs.* Chicago, and Chicago *vs.* Norton Mill Co., *supra*, are in conflict with this view. In each of those cases contractual relations were held to exist between the parties, which were binding upon them, while in this case the most that can be claimed by the complainant is that it was granted a permit by the city to erect its building. At the time it took out this permit, it had full knowledge of all the facts, and obviously was not misled by the city. The doctrine of estoppel, we think, has no application to the case at bar.

"It is finally urged the ordinance is unreasonable and discriminatory. We are unable to see that the ordinance is subject to attack for those reasons, but are of the opinion the criticisms made upon the ordinance in those particulars are hypercritical."

Judge Dillon was of the opinion (3 Dillon on Municipal Corporations, 5th edition, par. 1189), that the pre-

sumption of assent on the part of the city to the erection of a vault is not a presumption of a grant of title or of a permanent right of the city, "as no power exists in the authorities to make such grant or to confer any such right" (citing Dyshong *vs.* New York, 176 N. Y., 475, 483), and the author further adds "there is no absolute right in the owner to occupy the streets whether the fee is in the city or in the owner."

In Augusta *vs.* Burch, 26 L. R. A., 340 (Ga.), it was held that a city could not grant the right to erect and perpetually maintain awnings over the street.

In Eddy *vs.* Granger, 28 L. R. A., 517 (R. I.), it was held that a town or city could not grant the right to maintain a private drain in a highway so as to make the city liable to the owner for its cutting off. Nor can a city grant a right to maintain a standpipe in the street. Barrows *vs.* Sycamore, 25 L. R. A., 535 (Ill.); nor lease a portion of the street for huckster purposes, Schoff *vs.* St. Louis, 20 L. R. A., 783 (Mo.); and in this jurisdiction it has been decided that push-cart venders are on the streets merely by sufferance, Montz *vs.* D. C., 20 App., 568; and in Kansas City *vs.* E. Fifth Street Railway, 38 L. R. A., 218 (Mo.), it was held that the State was not estopped from revoking a street railway franchise granted by the city from the State.

It appears from the authorities quoted that the city has the power to impose a fee for the use of the vaults and may revoke the license in question at any time. Indeed, the latter proposition was admitted in the oral argument below and doubtless will be here. It could not well be denied in view of the express condition attached to the permit. If this power exist, then the licenses might have been revoked and the

respondents compelled to apply for new licenses carrying a rental under the law, and the proceedings would have been, concededly, regular. In other words, the authorities might have done indirectly what, as contended, they could not do directly. This proposition closely approximates a *reductio ad absurdum*, and is a concession of the issue.

It is respectfully submitted that the decision of the Court below was contrary to both principle and authority, and should be reversed.

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